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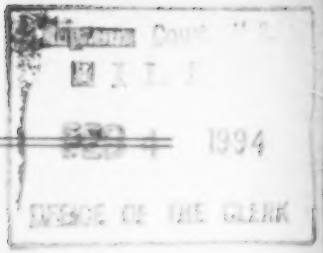

No. 93-1092

In the

Supreme Court of the United States

October Term, 1993

E. DON SMITH and EILEEN SMITH,
Pro Se Petitioners,

v.

ZONING BOARD OF APPEALS FOR
THE TOWN OF GREENWICH
— and —
THE HISTORICAL SOCIETY OF THE TOWN OF
GREENWICH, INCORPORATED
— and —
ANITA DE LESSUPS KEEFE,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of the State of Connecticut

BRIEF OF RESPONDENT THE HISTORICAL SOCIETY OF THE TOWN OF GREENWICH, INCORPORATED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN C. YAVIS, JR.
Counsel of Record

RUSSELL L. BRENNEMAN
EVERETT E. NEWTON
MURTHA, CULLINA, RICHTER
AND PINNEY
CityPlace I - 185 Asylum Street
Hartford, Connecticut 06103-3469
(203) 240-6000

February 4, 1994

19 pp

List of Parties

The parties to the proceeding below were:

Plaintiffs-Appellees:
E. Don Smith and Eileen Smith

Defendant-Appellant:
Zoning Board of Appeals for the Town of Greenwich

Additional Defendant-Appellant:
The Historical Society Of the Town of Greenwich, Incorporated*

Additional Defendant-Appellant:
Anita De Lessups Keefe

Amicus Curiae in the Connecticut Supreme Court:
Planning & Zoning Section of Connecticut Bar Association

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* Pursuant to Sup. Ct. R. 29.1, The Historical Society Of The Town of Greenwich, Incorporated states that it is a corporation having no parent corporation, subsidiaries or affiliates.

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Smith v. Zoning Board of Appeals of Town of Greenwich, 227 Conn. 71 (1993) (reproduced in Petitioners' Appendix ("A.") at A.1 - A.31).

Smith v. Zoning Board of Appeals of Town of Greenwich, 29 Conn. App. 28 (1992) (reproduced at A.53 - A.67), *rev'd and remanded*, 227 Conn. 71 (1993).

Smith v. Zoning Board of Appeals of Town of Greenwich, No. CV-0101333S, slip op. (Conn. Super. Ct. Apr. 10, 1991) (available on Westlaw at 1991 WL 57943), *rev'd*, 29 Conn. App. 29 (1992), *rev'd and remanded*, 227 Conn. 71 (1993).

Jurisdiction

This Court lacks jurisdiction to grant a writ of certiorari to the Connecticut Supreme Court pursuant to 28 U.S.C. § 1257 because the Smiths' uncompensated taking claim has not finally been decided and because their claims raise no substantial federal question.

Citations to Statutes, Rules and Regulations

28 U.S.C.A. § 1257(a) (1993):

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Sup. Ct. R. 10.1(c):

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

. . . .

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Greenwich Land Use Regulations § 6-266(a):

Note: The text of the regulation is reproduced at A.19 n.10 and in Appendix of Respondent Zoning Board of Appeals of Town of Greenwich.

Statement of the Case

E. Don Smith and Eileen Smith, husband and wife, own a single-family residence located on Strickland Road in the Mill Pond Historic District in Greenwich. A.4 (*Smith v. Zoning Board of Appeals of Town of Greenwich*, 227 Conn. 71, 74 (1993)). The Smiths' deed states that "[s]aid premises are conveyed subject to . . . [r]egulations imposed by reason of the fact that the premises are part of a historic district as established by the Town of Greenwich. . . ." A.9. The town's regulations permit the town planning and zoning commission ("commission"), in considering a subdivision application, to consider an assessment of various environmental factors, expressly including historical factors. *See*

Greenwich Land Use Regulations § 6-266(a)(19)(h) (reproduced at A.19-20 & n.10).

The Smith property, like others in the neighborhood, contains a house, a barn and a sweeping front lawn. A.7. In January 1987, the Smiths submitted a preliminary subdivision application seeking to subdivide their property into three lots, one containing their residence, another containing the barn, and a third containing a single family house to be constructed on the presently unimproved front lawn. A.4-7. After a hearing on the preliminary application, the commission ordered the Smiths to meet with the historic district commission[1] to determine an appropriate location for the proposed house. A.4-5. The historic district commission ultimately opposed the Smiths' subdivision proposal. A.6.

The Smiths submitted a final subdivision application with the proposed building lot on the front lawn, and on November 22, 1988, the commission denied the application because granting it would "permit construction of a house in the . . . significant open space [the front lawn], thereby disrupting the essential characteristic of the historic district." A.6. The Smiths appealed to the Planning and Zoning Board of

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1 The historic district commission was established pursuant to section 7-147f of the Connecticut General Statutes to determine whether proposed buildings are consistent with the historic district. A.26. The respondent Historical Society of the Town of Greenwich, Inc. is unrelated to the historic district commission or to the respondent board. The Historical Society does, however, expressly adopt the arguments in the board's Brief in Opposition to the Petition for Writ of Certiorari.

Appeals (another respondent in this matter, hereinafter "the board"), which conducted a public hearing and denied the Smiths' appeal. The Connecticut Supreme Court described the board's decision:

> The board concluded that the proposed building on lot 3 would disrupt the "sweeping front lawn" and, therefore, would not be consistent with the district's historic streetscape. The board stated that "[t]he proposed subdivision did not meet the purposes of the Subdivision Regulations as provided in Section 6-260, thereof. It does not conform to the Town of Greenwich Plan of Development in that it does not meet the basic objectives of preservation of historic and architectural resources. Furthermore, it does not preserve the natural features of the landscape; namely, the historic streetscape."

A.7 (footnote omitted).

The Smiths appealed the board's decision to the Superior Court, which disagreed with one of the bases for the decision but nevertheless dismissed the appeal, concluding that other statutes and regulations supported the board's action. A.8. The Smiths appealed further to the Connecticut Appellate Court, which reversed the judgment of the trial court and held that the board lacked the authority to consider historical factors in deciding whether to grant or deny a subdivision application. A.9-10. One factor in the Appellate Court's ruling was its belief that the terms "historic factors" and "historic streetscape" were not known and fixed standards. A.10.

The Connecticut Supreme Court granted the defendants, respondents in this Court, certification to appeal. The court reversed the judgment of the Appellate Court and directed reinstatement of the trial court's judgment dismissing the appeal. A.31. The Connecticut Supreme Court concluded that the Greenwich Town Charter, established by special act of the Connecticut legislature, A.11, authorized the town to adopt subdivision regulations that include consideration of historical factors: "we conclude that because the phrase 'public health and safety' includes environmental factors, it includes historical factors." A.16.

The Connecticut Supreme Court analyzed the regulations as adopted, and it concluded that the regulations authorized the board to consider the historic district commission's evaluation of the historic implications of the subdivision application. A.19-23. The court concluded, as a matter of state statutory construction, that the terms "historical factors" and "historic streetscapes," as used in the regulations and the town plan, "'are as reasonably precise as the subject matter requires and are reasonably adequate and sufficient to guide the commission and to enable those affected to know their rights and obligations.'" A.23. The court observed that this ruling disposed of the Smiths' due process claims. A.26 n.14.

The Connecticut Supreme Court rejected the Smiths' claim that denial of their subdivision application was an uncompensated taking, noting that the Smiths had failed to establish a lack of viable options for their property and that the board had found, as a matter of fact, that such options did exist. A.29-30. Relying on Connecticut law, the court held that there had been no final deprivation of the reasonable and proper use of the Smiths' property and therefore no unconstitutional taking without just compensation. A.30 & n.17 (also

noting that testimony of one commission member concerning a second option did not establish the board's position on viable alternatives).

Finally, the Connecticut Supreme Court declined to consider the Smiths' claim that the subdivision regulations had been unequally applied to them, holding that the issue had been only peripherally raised before the board and was never corroborated by evidence. A.30 n.18. On this record, the Smiths have petitioned this Court for certiorari review of the Connecticut Supreme Court's decision.

Summary of Argument

The board's factual finding that other viable options exist for the development of the Smiths' property renders the Smiths' petition for a writ of certiorari premature. The effect of the disputed subdivision regulation cannot be measured until the Smiths submit alternative development plans for their property and the board acts on the new application. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986); *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 200 & n.18 (1985). If the board ultimately denies all alternatives, the taking claim cannot be finally established until the Smiths show that they have been inadequately compensated for any lost property interest. *See Williamson*, 473 U.S. at 194-96 (claimant must seek post-deprivation remedy via available inverse condemnation proceeding to establish unjust compensation). Accordingly, this petition is unripe and must be dismissed for lack of jurisdiction.

Even if no subdivision is ever permitted, the Smiths will not have been denied all economically viable use of their property, and therefore will remain unable to claim that a

regulatory taking has occurred. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 674 n.8 (1976) (hornbook law that "mere diminution of market value or interference with the property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance or to entitle him to a variance or rezoning"). The Smiths will not be deprived of the present and historical uses of their residential property and have not even claimed a diminution in its value based on the board's action to date. They have therefore failed to establish a taking claim that presents a proper federal question reviewable under 28 U.S.C. § 1257.

Without a genuine claim that their property has been taken without adequate compensation, the Smiths have no basis for their due process allegation. The 14th Amendment's guaranty of due process protects only substantial rights, not the bare right to a particular form of procedure. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610 (1974). If the taking claim is premature, so too is the due process claim that must depend for its substance on the claimed taking. Moreover, the due process that the Smiths seek here has already been provided beyond all constitutional mandates by the state courts' review of their claim. *Eastlake*, 426 U.S. at 676-77. The Smiths have presented their case in hearings before the planning and zoning commission, the board, and all three levels of the Connecticut court system. The Connecticut Supreme Court concluded that the disputed regulation includes reasonably precise standards based on prior judicial usage. A.23-26 & n.14. The construction of Connecticut law by the state's highest court is binding on this Court. *Eastlake*, 426 U.S. at 674 & n.9. Nothing more is required to satisfy the demands of due process.

ARGUMENT

I. This Court Lacks Jurisdiction.

Before this Court can exercise certiorari jurisdiction to review a state court decision, the issue posed must be finally determined and must present a substantial federal question. 28 U.S.C. § 1257. The petition in this case fulfills neither requirement.

A. The Claimed Property Rights Have Not Been Finally Determined.

The board determined as a matter of fact that the Smiths have other viable options for the development of their property.[2] A.30 The Smiths, however, have not returned to the commission with any alternative development proposal. An essential prerequisite to the Smiths' taking claim is a "final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986) (a single subdivision proposal rejected by commission is not determinative of final application of regulation); *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 190 n.11 (1985) (petitioner's

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2 The speculative remark by an individual board member as to the prospects of another proposal did not rise to the level of a factual finding or a determination of all viable alternatives. A.30 n.17. The Smiths' reliance on the factual import of that remark, Petition at 24-25, is an inappropriate attack on the facts that militates against granting the petition in this case.

failure to seek variance makes it "impossible to tell whether the land retain[s] any reasonable beneficial use"); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (constitutionality of zoning ordinance cannot be judged until petitioner applies to make actual improvements); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 631-33 & n.12 (1981) (appeal dismissed for lack of jurisdiction because city's open space requirement did not deprive utility of all beneficial use of property where state court had not found facts to support taking). Absent a finding by the state court that the board's application of the regulation deprives the Smiths of all economically viable use of their property, their petition to this Court is premature and must be dismissed for want of jurisdiction. *MacDonald*, 477 U.S. at 351-52.

B. The Petition Poses No Federal Question.

This Court has no jurisdiction to review a judgment of a state's highest court unless a substantial federal issue is presented. 28 U.S.C. § 1257(a). To raise a substantial federal question giving rise to certiorari jurisdiction in this Court, the Smiths must show not only that the state's highest court has upheld the disputed statute or regulation, but also that they have been deprived of all economically beneficial use of their property without just compensation. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 312-13 & n.8 (1987); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992). As a matter of fact, the board's denial of the Smiths' subdivision application has not deprived the Smiths of all use of their property. A.30. Accordingly, the state court holdings are conclusive of the Smiths' claims, and no federal question is presented. *See First English*, 482 U.S. at 312-13 & n.8 (certiorari jurisdiction requires both a taking and a decision upholding state statute authorizing the taking).

Although the Smiths' petition makes liberal use of the terms due process, uncompensated taking and unequal protection, their bare averment of unconstitutionality does not itself create a substantial federal question. *City of New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 87 (1891). The facially frivolous elements of the petition, such as the frequent appeals to facts not established below, *e.g.*, Petition at *i*, 4, 6, 11, 20, 24-25, *see N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951) (function of this Court is not to review factual findings or evaluate evidence), and to arguments contained in an amicus brief filed with the Connecticut Supreme Court appeal, *e.g.*, Petition at 1, 7-8, 15-16, do not create a substantial federal question. *City of Chanute v. Trader*, 132 U.S. 210, 214 (1889). Nor can the Smiths raise a substantial federal question by ignoring this Court's previous decisions governing regulatory takings and due process. *See* Sup. Ct. R. 10.1(c) (certiorari should be granted only when state court decision contains important question of federal law that has not been decided by this Court or that conflicts with such decision); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73-74 (1955). Eliminating these distracting elements from the petition leaves no federal question for this Court to decide.

The Connecticut Supreme Court properly disposed of all of the Smiths' claims under state law. It concluded that the board was authorized to consider historical factors in its deliberations under the applicable subdivision regulation. A.16. In so deciding, the Connecticut Supreme Court ruled that the legislatively authorized town charter provided for subdivision regulations consistent with "health or the public safety," that public health and safety includes consideration of the environment, that the environment includes historical factors, and that the consideration of historical factors was expressly included in the regulation. A.14-16, A.19-23.

Finally, the Connecticut Supreme Court noted that the terms "historical factors" and "historic streetscapes," used in the regulation and in the town plan (which serves as an interpretative guide for the board), have been given reasonably precise meanings through prior judicial usage. A.23-25. The Connecticut Supreme Court's construction of Connecticut law is binding on this Court. *Eastlake*, 426 U.S. at 674 n.8. The Smiths' claims as to the meaning of the statutes and regulations are therefore beyond this Court's jurisdictional reach.

The Smiths' due process claim is disposed of by the Connecticut Supreme Court's conclusion that the regulation and the references to "historical factors" and "historic streetscapes" have reasonably precise meanings, sufficient to notify the Smiths of their subdivision rights. *See* A.26 n.14. The due process requirements of the 14th Amendment are satisfied by state court review of the Smiths' claim that the denial of their subdivision application was unreasonable. *Eastlake*, 426 U.S. at 676-77. The gravamen of the Smiths' claim is that they did not know that subdivision approval could be withheld on the basis of historical factors. Petition at 19-21. As the Connecticut Supreme Court held, the answer to that claim lies in the regulation, which expressly refers to "historical factors," in the town plan which refers to the need to preserve "historical streetscapes," and, perhaps, in the Smiths' own deed, which warns of potential restrictions based on the historic location of their property. A.9, A.19 n.10, A.24.

The Smiths also claim that the term "public health and safety," as the Connecticut Supreme Court has applied it, is arbitrary and lacking standards. Petition at 18-19. The argument is specious because the regulation and town plan provide specific notice that historic factors are relevant to

subdivision applications. It is axiomatic that the statute and regulation are construed together and that the Connecticut Supreme Court's construction is as binding as if the construction were written into the statute. *R.A.V. v. St. Paul*, 112 S. Ct. 2538, 2542 (1992); *Kolender v. Lawson*, 461 U.S. 352, 353, 354(1983); *Pollard v. Dwight*, 8 U.S. (4 Cranch) 421, 429 (1808) (Marshall, C.J.). The Connecticut Supreme Court properly concluded that these terms point to identifiable and sufficiently distinct historical standards that property owners are on notice of the types of historical facts that will be considered. A.25. This interpretation of the Connecticut statutory scheme leaves nothing for this Court to decide.

The final element of the Smiths' petition is their claim of unequal treatment or discrimination. The Connecticut Supreme Court ruled that this claim was only peripherally raised below and was unsupported by any evidence. A.30. This Court does not decide issues that have not been properly raised or addressed below. *Yee v. City of Escondido*, 112 S. Ct. 1522, 1531 (1992).

CONCLUSION

For all the foregoing reasons, The Historical Society of the Town of Greenwich, Inc., respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

JOHN C. YAVIS, JR.
RUSSELL L. BRENNEMAN
EVERETT E. NEWTON

All of:
MURTHA, CULLINA, RICHTER and PINNEY
CityPlace I - 185 Asylum Street
Hartford, Connecticut 06103-3469
Telephone: (203) 240-6000
Attorneys for Respondent
The Historical Society of the Town of Greenwich, Inc.